CELCOM (MALAYSIA) BHD & ANOR v. TAN SRI DATO' TAJUDIN RAMLI & ORS AND ANOTHER CASE (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUITS NO: D5-22-610-2006 & D1-22-1960-2008]
9 JANUARY 2018

EVIDENCE: *Witness – Subpoena – Application to set aside – Witnesses subpoenaed to testify in court – Suits in relation to allegations of breach of fiduciary and statutory duties of directors and conspiracy to injure companies – Whether subpoenaed persons may apply to set aside subpoena before commencement of trial – Whether ground that evidence may be given by subpoenaed witnesses admissible – Whether court ought to exercise inherent jurisdiction of court to set aside subpoenas – Rules of Court 2012, O. 92 r. 4*

The present applications arose from two consolidated suits initiated by Celcom (Malaysia) Bhd ('the first plaintiff') and Technology Resources Industries Bhd ('the second plaintiff') ('the plaintiffs'). In the first suit, the plaintiffs claimed, *inter alia*, that nine defendants had breached their fiduciary and statutory duties as directors of the plaintiffs. In the second suit, the plaintiffs alleged that seven defendants had conspired to injure the plaintiffs and this resulted in losses. Tan Sri Dato Tajudin Ramli and Bistamam Ramli, the first and second defendants ('the respondents) in the two suits, filed two counterclaims on the grounds that (i) there was a global settlement; (ii) the first respondent had complied with the global settlements by withdrawing his claims and counterclaims; (iii) the plaintiffs had breached the global settlement by refusing to withdraw the two suits ('breach of global settlement'); and (iv) the plaintiffs conspired with each other, *inter alia*, by filing the two suits ('conspiracy issue'). Seven applications were filed by seven individuals to set aside the subpoenas issued by the respondents to testify in the trial of the two suits. The seven individuals were (i) Tan Sri Mohamed Azman Yahya ('TSMAY') (encl. 178); (ii) Tan Sri Azman Mokhtar ('TSAM') (encl. 180); (iii) Tan Sri Zamzamzairani ('TSZ') (encl. 182); (iv) Datuk Bazlan Osman ('DBO') (encl. 184); (v) Putri Noor Shariza ('PNS') (encl. 187); (vi) Ng Swee Kee ('NSK') (encl. 190); and (vii) Tan Sri Dato' Dr Mohd Munir Abd Majid ('TSDM'). The primary issue that arose for the court's adjudication was whether, before the commencement of trial, a person who has been subpoenaed to give evidence at the trial, may apply to the court to set aside the subpoena on the ground that the evidence which may be given by the subpoenaed witnesses is not admissible.

Held (allowing encl. 178 and dismissing encls. 180, 182, 184, 187, 190 and 210):

(1) The court has the inherent jurisdiction and/or inherent power under O. 92 r. 4 of the Rules of Court 2012 ('the ROC') to set aside a subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process. The court should distinguish between an application to set aside a subpoena which has been filed before the commencement of a trial ('setting aside application') and a setting aside application which is made during a trial. In a setting aside application, the party who has obtained a subpoena has the burden to satisfy the court that the subpoena is not frivolous and vexatious and does not constitute an abuse of court process by showing that the subpoenaed witness is able to give some evidence regarding (i) any fact in issue; or every fact declared by the Act as relevant, namely a fact which is relevant under ss. 6 to 55 of the Act. (paras 7, 8 & 9)

(2) When a setting aside application is made before the commencement of the trial, the party who has subpoenaed a witness may discharge the burden to persuade the court that the subpoenaed witness is able to give some evidence regarding a 'fact in issue' or 'relevant fact'. However, when a setting aside application is made during a trial, the party who has subpoenaed a witness has the burden to satisfy the trial court that the subpoenaed witness is in a position to give evidence regarding a 'fact in issue' or 'relevant fact'. (paras 10 & 11)

(3) The respondents filed two affidavits to oppose encl. 178 but both affidavits did not show how TSAY was able to give some evidence regarding a 'fact in issue' or 'relevant fact' in the trial. The court exercised its discretion pursuant to the court's inherent jurisdiction and/or power to allow encl. 178 and set aside the subpoena issued to TSAY as it was frivolous, vexatious and constitutes an abuse of court process. (para 13)

(4) The respondents have discharged the burden to prove that TSAM and TSZ were in a position to give evidence in the trial regarding a 'fact in issue' or 'relevant fact' in the counterclaims, namely on the issue of a breach of global settlement and conspiracy. TSAM was the Chairman of Axiata Group Bhd, the holding company of the plaintiffs while TSZ was the Managing Director and Chief Executive Officer of Telekom Malaysia Bhd, the third defendant in the counterclaim. There were letters which involved TSAM and TSZ. Enclosures 180 and 182 were dismissed. (paras 15, 17, 19, 20 & 33)

(5) DBO was the Chief Financial Officer of the first plaintiff and had attended meetings of the first plaintiff's Board of Directors and Board Committee of Independent Directors regarding the price of the first

plaintiff's shares. The respondents have discharged the burden to satisfy the court that DBO was in a position to give evidence at the trial regarding a 'relevant fact' concerning the price of the first plaintiff's shares which was relevant to the plaintiffs' defence in respect of the breach of duty issue in the first suit and/or relevant regarding the conspiracy issue in the counterclaims. Enclosure 184 was dismissed. (paras 22, 24 & 33)

(6) PNS and NSK were advocates and solicitors who acted for the plaintiffs. Along with TSZ, they were in a position to give evidence at the trial regarding a 'relevant fact' concerning the first plaintiff's acquisition of TM Cellular Sdn Bhd. This was because they attended meetings of the first plaintiff's Board of Directors and Board Committee of Independent Directors. Enclosures 187 and 190 were dismissed with costs. (paras 25, 26, 30 & 33)

(7) TSM, the Chairman and Director of the first plaintiff, affirmed a statutory declaration pursuant to s. 169(15) of the Companies Act 1965 regarding the first plaintiff's audited accounts. TSM was in a position to give evidence at the trial regarding 'relevant fact' concerning the acquisition of TM Cellular Sdn Bhd, which was relevant to the plaintiffs' defence regarding the breach of duty issue in the first suit and/or conspiracy issue in the counterclaims. (paras 31 & 33)

Case(s) referred to:

Berjaya Land Bhd v. Wong Chee Hie & Ors [2012] 4 CLJ 356 HC ***(refd)***
Dea Ai Eng v. Dr Wong Seak Shoon & Anor [2007] 7 CLJ 337 HC ***(refd)***
Sri Paandi Restaurant Sdn Bhd & Anor v. Saraswathy Kesavan & Ors [2017] 1 LNS 610 HC ***(refd)***
Sundralingam v. Ramanathan Chettiar [1967] 1 LNS 173 FC ***(refd)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***
World Grand Dynamic Marketing Sdn Bhd v. FJVAA SPA Sdn Bhd & Ors [2017] 1 CLJ 720 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 169(15)
Evidence Act 1950, ss. 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 31A, 32, 32A, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 126(1)
Rules of Court 2012, O. 18 r. 7(1), O. 34 r. 2(2)(c), (d), (e)(i), (f), (g) (h), (i), (j), (k), (m), O. 59 r. 8(b), O. 92 r. 4

For Tan Sri Azman Yahya & Tan Sri Azman Mokhtar - *Nitin Nadkarni & Crystal Wong Wai Chin; M/s Lee Hishammuddin Allen Gledhill*
For Tan Sri Zamzamzairani & Datuk Bazlan - *Lambert Rasa-Ratnam, G Vijay Kumar & Aaron Wu Zhi Chung; M/s Lee Hishammuddin Allen Gledhill*

A *For the plaintiffs, Puan Putri, Ng & Tan Sri Munir* - *Nad Segaram, Soo Siew Mei & Siew Huei Ira; M/s Shearn Delamore & Co*
For the respondents - *Lim Kian Leong, Tan Keng Teck, Chai Jai Hui, Janet Tang & Tobias Lim Koon Li; M/s Lim Kian Leong & Co*

B *Reported by Najib Tamby*

JUDGMENT

(court encl. nos. 178, 180, 182, 184, 187, 190 and 210)

C **Wong Kian Kheong JC:**

Introduction

[1] This judgment discusses, among others, the novel question of whether before the commencement of trial, a person who has been subpoenaed to give evidence at the trial (subpoenaed witness), may apply to court to set aside
D the subpoena on the ground that the evidence which may be given by the subpoenaed witness is not admissible because the evidence is:

(a) made on a "without prejudice" basis within the meaning of s. 23 of the Evidence Act 1950 (EA); or

E (b) legally privileged under s. 126(1) EA.

Background

[2] The above two suits (two suits), civil suit No. D5-22-610-2006 (first suit) and Civil Suit No. D1-22-1960-2008 (second suit), have been
F consolidated.

[3] In the first suit, the plaintiff companies (plaintiffs) claimed, among others, that nine individual defendants had breached their fiduciary and statutory duties as directors of the plaintiffs regarding, among others, certain contracts and transactions (breach of duty issue (first suit)].

G **[4]** The plaintiffs alleged in the second suit, among others, that seven defendants had conspired, either by lawful or unlawful means, to injure the plaintiffs and had thereby caused loss to the plaintiffs.

[5] Tan Sri Dato' Tajudin bin Ramli (first defendant) and Encik Bistamam
H bin Ramli (second defendant) are the first and second defendants in the two suits. The first and second defendants have filed two counterclaims in the two suits (counterclaims). The counterclaims pleaded, among others, as follows:

(a) there was a "global settlement" between:

I (i) the Malaysian Government (Govt) on behalf of, among others, the plaintiffs; and

(ii) the first defendant;

(b) the first defendant had complied with the global settlement by, among others, withdrawing all his claims and counterclaims in certain suits against, among others, the Govt, Pengurusan Danaharta Nasional Bhd, Malaysian Airline System Bhd, the plaintiffs and Telekom Group of Companies;

(c) the plaintiffs had breached the global settlement by refusing to withdraw the two suits (breach of global settlement issue (counterclaims)); and

(d) the plaintiffs had conspired with each other, among others, by filing the two suits (conspiracy issue (counterclaims)).

Seven Applications

[6] This judgment concerns seven applications filed by the following persons to set aside subpoenas issued by the first and second defendants (respondents) for them to testify in the trial of the two suits (trial):

(a) an application in court encl. no. 178 (encl. 178) by Tan Sri Mohamed Azman bin Yahya (Tan Sri Azman Yahya);

(b) an application in court encl. no. 180 (encl. 180) by Tan Sri Dato' Azman bin Mokhtar (Tan Sri Azman Mokhtar);

(c) an application in court encl. no. 182 (encl. 182) by Tan Sri Zamzamzairani bin Mohd Isa (Tan Sri Zamzamzairani);

(d) an application in court encl. no. 184 (encl. 184) by Datuk Bazlan bin Osman (Datuk Bazlan);

(e) an application in court encl. no. 187 (encl. 187) by the plaintiffs and Puan Putri Noor Shariza binti Noordin Omar (Puan Putri);

(f) an application in court encl. no. 190 (encl. 190) by the plaintiffs and Mr Ng Swee Kee (Mr Ng); and

(g) an application in court encl. no. 210 (encl. 210) by Tan Sri Dato' Dr Mohd Munir Abd Majid (Tan Sri Munir).

Court's Power To Set Aside Subpoenas

[7] It is not disputed that the court has inherent jurisdiction and/or inherent power under O. 92 r. 4 of the Rules of Court 2012 (RC) to set aside a subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process - please see the cases referred to in *World Grand Dynamic Marketing Sdn Bhd v. FJVAA SPA Sdn Bhd & Ors* [2017] 1 CLJ 720; [2017] 1 AMR 94, at paras. 12-15.

Whether Application To Set Aside Subpoena Is Made Before Commencement Of Trial Or Is Made During Trial

[8] I am of the view that the court should distinguish between an application to set aside a subpoena (setting aside application) which has been filed before the commencement of a trial and a setting aside application which is made during a trial. This distinction is necessary for the following reasons:

(a) before the commencement of a trial, the court should not decide on issues regarding admissibility of evidence. Questions on admissibility of evidence should be decided by the trial court after the commencement of the trial. This will preserve the integrity of the trial. Accordingly, if a setting aside application is filed before the commencement of a trial based solely on an allegation that the subpoenaed witness' evidence is not admissible (for whatever reason), the court should not consider, let alone decide on, the issue on the admissibility of the evidence proposed to be given by the subpoenaed witness before the commencement of trial. If otherwise, the court hearing a setting aside application before the commencement of trial, will usurp the duty and function of the trial court to decide the question of admissibility of the evidence in question during trial; and

(b) if a setting aside application is made before the commencement of trial, the court can only decide such an application based on affidavit evidence. It is trite law that in an application based on affidavit evidence, the court should refrain from resolving any conflict in affidavit evidence by having a trial based on affidavits. Furthermore, in deciding a setting aside application made before the commencement of trial, the court cannot ascertain the truth of the contents of affidavits because generally, the deponents of affidavits cannot be cross-examined by learned counsel from the opposing party.

[9] In a setting aside application, the party (who has obtained a subpoena) has the burden to satisfy the court that the subpoena:

(a) is not frivolous;

(b) is not vexatious; and

(c) does not constitute an abuse of court process

by showing that the subpoenaed witness is able to give some evidence regarding:

(a) any "fact in issue" (defined in s. 3 EA as "any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows"); or

(b) every fact declared by EA as relevant, namely a fact which is relevant under ss. 6 to 55 (contained in Chapter II EA which is entitled "Relevancy of Facts"). According to s. 3 EA, "one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the (EA) relating to the relevancy of facts".

In the Supreme Court case of *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345; [1993] 3 MLJ 679, at 350 (CLJ); 687 (MLJ), Mohamed Azmi SCJ has required a party issuing a subpoena to show the "materiality" of the subpoenaed witness for the just decision of the case. With respect, our EA provides for "facts in issue" and "relevant facts". A party who has obtained a subpoena, may successfully resist a setting aside application if the party is able to show that the subpoenaed witness is in a position to give some evidence regarding a "fact in issue" or "relevant fact".

[10] When a setting aside application is made before the commencement of trial, I am of the following view:

(a) the party who has subpoenaed a witness, may discharge the burden to persuade the court that the subpoenaed witness is able to give some evidence regarding a "fact in issue" or "relevant fact" by averring such a fact in an affidavit which is filed to oppose the setting aside application (opposing affidavit). In this regard, I am not able to accede to a contention by Mr Lambert Rasa-Ratnam (learned counsel for Tan Sri Zamzamzairani and Datuk Bazlan) that "materiality of a witness must be assessed based on the parties' pleaded case and not what they claim on affidavit". Mr Lambert relied on the High Court case of *Berjaya Land Bhd v. Wong Chee Hie & Ors* [2012] 4 CLJ 356. Firstly, *Berjaya Land* did not decide that a party issuing a subpoena is only confined to the party's pleaded case and cannot rely on an opposing affidavit to resist successfully a setting aside application. More importantly, O. 18 r. 7(1) RC mandatorily requires a pleading to contain "a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits". As a pleading cannot contain averments regarding evidence (by reason of O. 18 r. 7(1) RC), it is unjust to confine a party (who has obtained a subpoena) to the party's pleaded case in respect of the party's opposition to a setting aside application;

(b) if the opposing affidavit cannot show that the subpoenaed witness is able to give some evidence regarding a "fact in issue" or "relevant fact", the party (who has subpoenaed the witness) has failed to discharge the burden to satisfy the court that the subpoena is not frivolous, not vexatious and does not constitute an abuse of court process. Accordingly, the court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena;

(c) if the opposing affidavit is able to show that the subpoenaed witness may give some evidence regarding a "fact in issue" or "relevant fact":

(i) if the contents of the opposing affidavit are denied by an affidavit from the subpoenaed witness, the court hearing the setting aside application should:

- not resolve any conflict in affidavit evidence (please see the reasons given in the above sub-para. 8(b)); and
- dismiss the setting aside application; and

(ii) if the subpoenaed witness raises any ground to object to the admissibility of evidence to be given by the subpoenaed witness, the court hearing the setting aside application should:

- not decide on the issue regarding the admissibility of evidence to be given by the subpoenaed witness (which should be decided by the trial court after the commencement of the trial - please see the above para. 8); and
- dismiss the setting aside application.

I rely on Nallini Pathmanathan J's (as she then was) decision in *Berjaya Land*, at paras. 25, 28, 29 and 33, as follows:

> [25] **It also needs to be considered whether this court should or can, at this interlocutory stage, determine this issue summarily rather than at trial**. ...
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> ...
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> [28] As such the issue before the court is whether or not the privilege and thereby confidentiality that exists in respect of solicitor-client communications is lifted by reason of an illegal purpose. In order to decide whether the purpose is illegal or otherwise, is it permissible for this court to determine that issue on a perusal of the 2nd email and on the basis of the affidavits and submissions filed by the parties? Is the court to make a determination of whether or not the 2nd email was made or written in furtherance of an illegal purpose at this interlocutory stage in a summary fashion on the basis of conflicting affidavits?
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> [29] *If the current application to set aside the subpoena did not fall to be determined, the issue of whether or not the communication was written in furtherance of an illegal purpose would be determined in the normal course of events at trial. The subject witness would attend and assert the right not to reply to questions pertaining to the 2nd email on the grounds of privilege under s. 126 [EA] whereupon the court would then hear arguments and make a determination at trial. Should the court embark upon this exercise at this stage*?
>
> ...

[33] ... **The proper forum and time for this contention to be taken, it seems to me, is at trial**.

(emphasis added); and

(d) if it is proven later at the trial that the subpoenaed witness is not able to give any evidence regarding a "fact in issue" or "relevant fact", the following redress is available:

(i) if the subpoenaed witness has suffered any loss or damage due to the subpoena which constitutes an abuse of court process, the subpoenaed witness may file a suit against the party (who has obtained the subpoena) to claim damages for the tort of abuse of court process (by obtaining a frivolous and vexatious subpoena) - please see *Sri Paandi Restaurant Sdn Bhd & Anor v. Saraswathy Kesavan & Ors* [2017] 1 LNS 610; [2017] 4 AMR 593, at sub-para. 18(1)(b). The decision in *Sri Paandi Restaurant* has been affirmed on appeal to the Court of Appeal; and

(ii) the court may penalise the party who has wrongfully obtained the subpoena with costs pursuant to O. 59 r. 8(b) RC (the conduct of all the parties, including conduct ... during the proceedings).

[11] When a setting aside application is made during a trial:

(a) the party (who has subpoenaed a witness) has the burden to satisfy the trial court that the subpoenaed witness is in a position to give evidence regarding a "fact in issue" or "relevant fact". In deciding the setting aside application, the trial court may refer to the affidavits filed in the setting aside application and the following documents:

(i) the pleadings;

(ii) statement of issues to be tried (filed pursuant to O. 34 r. 2(2)(k) RC);

(iii) witness statements (filed pursuant to O. 34 r. 2(2)(m) RC),

(iv) common bundles of documents (filed pursuant to O. 34 r. 2(2)(c) to (i) RC); and

(v) oral evidence recorded from other witnesses (if any)

(court materials);

(b) based on the opposing affidavit and court materials, if the party (who has obtained a subpoena) cannot show that the subpoenaed witness is able to give some evidence regarding a "fact in issue" or "relevant fact", the trial court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process; and

(c) if, based on the opposing affidavit and court materials, the party (who has subpoenaed a witness) is able to show that the subpoenaed witness can give evidence regarding a "fact in issue" or "relevant fact" but if the setting aside application is based on an alleged non-admissibility of evidence (for whatever reason) to be given by the subpoenaed witness, the trial court is duty-bound to decide on the issue of admissibility of evidence to be given by the subpoenaed witness. If the trial court finds that the proposed evidence to be given by the subpoenaed witness is:

(i) admissible at the trial, the trial court should dismiss the setting aside application; and

(ii) not admissible at the trial, the trial court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process.

[12] If the position set out in the above paras. 8 to 11 is adopted, a party should not file a setting aside application before the commencement of trial if the party only intends to object to the admissibility of evidence which may be given by a subpoenaed witness. In such a situation, the party should wait for the trial to commence and then either:

(a) file a setting aside application; or

(b) object to the admissibility of evidence given by the subpoenaed witness.

The above approach will ensure that the commencement of a trial is not unduly delayed by the filing of a setting aside application.

Enclosures 178 and 180

[13] The respondents had filed two affidavits to oppose encl. 178. Both affidavits from the respondents, in my view, do not show how Tan Sri Azman Yahya is able to give some evidence regarding a "fact in issue" or "relevant fact" in the trial. Accordingly, I exercise my discretion pursuant to the court's inherent jurisdiction and/or power to allow encl. 178 and set aside the subpoena issued to Tan Sri Azman Yahya on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process.

[14] In support of encl. 180, Dato' Nitin Nadkarni, learned counsel for Tan Sri Azman Mokhtar, contended as follows:

(a) the respondents relied on a series of "without prejudice" letters in 2014 (2014 letters) to show the relevancy of evidence which might be given by Tan Sri Azman Mokhtar at the trial. Tan Sri Azman Mokhtar objects to the admissibility of the 2014 letters; and

(b) even if the 2014 letters can be considered by the court, Tan Sri Azman Mokhtar cannot give any evidence which is relevant to the trial because:

(i) the global settlement was alleged by the respondents to have been reached before 14 February 2012. Accordingly, the 2014 letters were irrelevant to the question of whether the global settlement had been concluded in 2012; and

(ii) an examination of the 2014 letters did not prove that the global settlement had been attained. On the contrary, a "without prejudice" letter dated 9 May 2014 from Datuk Azzat Kamaluddin (Datuk Azzat) to the first defendant (copied to, among others, Tan Sri Azman Mokhtar) showed that "without prejudice" negotiations were still carrying on at that time.

[15] Regarding encl. 180, this court is satisfied that the respondents have discharged the burden to prove that Tan Sri Azman Mokhtar is in a position to give evidence in the trial regarding a "fact in issue" or "relevant fact" concerning the breach of global settlement issue (counterclaims) and/or conspiracy issue (counterclaims). This is clear from the following evidence:

(a) Tan Sri Azman Mokhtar was the Chairman of Axiata Group Bhd (AGB), the holding company of the plaintiffs; and

(b) the following letters involved Tan Sri Azman Mokhtar:

(i) the first defendant's letter dated 19 March 2014 to Tan Sri Azman Mokhtar as the Managing Director (MD) of Khazanah Nasional Bhd (Khazanah);

(ii) letter dated 4 April 2014 from Khazanah's Legal Director, Encik Mohammed Nasri Sallehuddin (Encik Nasri) to the first defendant (this letter was copied to, among others, Tan Sri Azman Mokhtar);

(iii) the first defendant's letter dated 7 April 2014 to Tan Sri Azman Mokhtar;

(iv) Encik Nasri's letter dated 14 April 2014 to the first defendant (this letter was copied to, among others, Tan Sri Azman Mokhtar); and

(v) the first defendant's letter dated 15 April 2014 to Datuk Azzat, a Senior Independent Director of AGB (this letter was copied to, among others, Tan Sri Azman Mokhtar).

[16] As explained in the above paras. 8 to 11, before the commencement of trial, the court cannot consider whether the 2014 letters are admissible or not as evidence at the trial. Once the respondents are able to discharge the burden to show that Tan Sri Azman Mokhtar is able to give evidence

regarding the breach of global settlement issue (counterclaims) and/or conspiracy issue (counterclaims), encl. 180 should be dismissed on this ground alone.

[17] Dato' Nitin represented Tan Sri Azman Yahya and Tan Sri Azman Mokhtar in encls. 178 and 180 respectively. As the court had allowed encl. 178 but dismissed encl. 180, Dato' Nitin proposed that no order as to costs should be made regarding these two applications. Learned counsel for the respondents, Mr Lim Kian Leong, agreed to Dato' Nitin's proposal and I so ordered.

Enclosure 182

[18] Mr Lambert submitted that encl. 182 should be allowed on the following grounds:

(a) Tan Sri Zamzamzairani merely received a letter dated 8 August 2011 from the then Hon Minister in the Prime Minister's Department, Datuk Seri Mohamed Nazri bin Abdul Aziz (Minister) regarding the alleged global settlement. Tan Sri Zamzamzairani has no personal knowledge regarding the alleged global settlement; and

(b) Tan Sri Zamzamzairani was not involved in any discussion, negotiation or arrangement concerning the alleged global settlement.

[19] I accept Mr Lim's submission that Tan Sri Zamzamzairani is able to give evidence at the trial regarding a "fact in issue" or "relevant fact" in respect of the breach of global settlement issue (counterclaims) and/or conspiracy issue (counterclaims). This decision is premised on the following reasons:

(a) at the material time, Tan Sri Zamzamzairani was the MD and Chief Executive Officer (CEO) of Telekom Malaysia Bhd (TMB), the third defendant in the counterclaims; and

(b) the letter dated 8 August 2011 was not sent by any person but by the Minister. Furthermore, the Minister's letter was sent specifically to Tan Sri Zamzamzairani as TMB's MD and CEO (this letter was copied to, among others, the then Second Minister of Finance). Significantly, the contents of the Minister's letter concerned the global settlement.

[20] Based on the above reasons, I have no hesitation to dismiss encl. 182 with costs.

Enclosure 184

[21] Mr Lambert advanced the following submission in support of encl. 184:

(a) at the material time, Datuk Bazlan was not a member of the first plaintiff company's (first plaintiff):

(i) Board of Directors (BOD); and

(ii) Board Committee of Independent Directors (BCID);

(b) regarding the minutes of meetings of the first plaintiff's BOD and BCID, the plaintiffs would be calling the first plaintiff's company secretary and certain members of the first plaintiff's BOD and BCID (including Datuk Azzat). As such, Datuk Bazlan was not the "proper" witness to be subpoenaed by the respondents; and

(c) the price of the first plaintiff's shares (price) in respect of the first plaintiff's acquisition of TM Cellular Sdn Bhd (acquisition) was decided by the first plaintiff's BOD and not by Datuk Bazlan. Furthermore, the price had been fixed after the first plaintiff's BOD had considered a valuation by the first plaintiff's independent advisors, Goldman Sachs Singapore Ltd (Goldman). The independent advice letter by Aseambankers Malaysia Bhd (Aseambankers) stated the price was fair and reasonable. In any event, the respondents had subpoenaed witnesses from Goldman and Aseambankers to testify in the trial regarding the acquisition. Accordingly, Datuk Bazlan was not the proper witness to be subpoenaed by the respondents to give evidence at the trial.

[22] I am of the view that that the respondents have discharged the burden to satisfy the court that Datuk Bazlan is in a position to give evidence at the trial regarding a "relevant fact" concerning the price (which is relevant to the respondents' defence in respect of the breach of duty issue (first suit) and/or is relevant regarding the conspiracy issue (counterclaims)). This decision is due to the following reasons:

(a) Datuk Bazlan was the first plaintiff's Chief Financial Officer at the material time; and

(b) Datuk Bazlan attended meetings of the first plaintiff's BOD and BCID concerning the price.

[23] Once the respondents are able to show that Datuk Bazlan is able to give evidence at the trial regarding a "relevant fact", it does not matter that:

(a) the plaintiffs would be calling "appropriate" witnesses (not the subpoenaed witness) to testify at the trial; and

(b) Datuk Bazlan is not the "proper" witness to be subpoenaed by the respondents.

[24] Premised on the above reasons, I am constrained to dismiss encl. 184 with costs.

Enclosures 187 and 190

[25] Mr Nad Segaram, learned counsel for the plaintiffs, Puan Putri and Mr Ng, submitted that at all material times, Puan Putri and Mr Ng were advocates and solicitors who acted for the first plaintiff. As such, any evidence regarding the communication between Puan Putri and Mr Ng on the one part and the first plaintiff on the other part (communication), is legally privileged and cannot be admitted as evidence in the trial pursuant to s. 126(1) EA. Reliance was placed on, among others, VT Singam J's decision in the High Court case of *Dea Ai Eng v. Dr Wong Seak Shoon & Anor* [2007] 7 CLJ 337; [2007] 2 MLJ 357.

[26] I accept Mr Lim's contention that Puan Putri and Mr Ng are in a position to give evidence at the trial regarding a "relevant fact" concerning the acquisition (which is relevant to the respondents' defence regarding the breach of duty issue (first suit) and/or conspiracy issue (counterclaims)). This is because Puan Putri and Mr Ng attended meetings of the first plaintiff's BOD and BCID concerning the acquisition.

[27] Once the respondents are able to discharge the burden to show that Puan Putri and Mr Ng are able to give evidence at the trial concerning a "relevant fact", at this juncture (before commencement of trial), I cannot decide on the admissibility of the communication (which is the judicial duty and function of the trial court) - please see the above paras. 8 to 11. This decision is supported by *Berjaya Land*, at para. 35, as follows:

> [35] *It appears to this court that the most appropriate course to adopt would be for the solicitor to attend as a witness pursuant to the subpoena and to invoke the privilege under s. 126 [EA], at that stage. It would then be open to the parties to take up the arguments now set out and for the court to make a determination then. The court might well allow or disallow certain questions in order that it may determine the legality or otherwise of the 2nd email. The court will then be in a position to make a ruling on the matter more fully*.
>
> (emphasis added).

[28] Without intending any disrespect to Mr Nad, except for *Dea Ai Eng*, all the cases cited by him do not concern setting aside applications which had been filed before the commencement of trial and which were based on inadmissibility of evidence to be given by the subpoenaed witness.

[29] I acknowledge that in *Dea Ai Eng*, the High Court had set aside a subpoena before the commencement of trial on the ground that the evidence to be given by the expert medical doctor was privileged. There was however no discussion in *Dea Ai Eng* that questions on admissibility of evidence should be dealt by the court during trial and not by way of affidavits before the commencement of trial. With respect, I decline to follow *Dea Ai Eng* due to the reasons expressed in *Berjaya Land* and the above paras. 8 to 12. It is to be noted that one High Court Judge or Judicial Commissioner is not bound

by a decision of another High Court Judge or Judicial Commissioner - please see Ong Hock Thye FJ's (as he then was) judgment in the Federal Court case of *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211, at 213.

[30] Premised on the reasons given in the above paras. 8 to 12 and 26 to 29, encls. 187 and 190 are dismissed with costs.

Enclosure 210

[31] Mr Nad has contended that Tan Sri Munir is not able to give any relevant evidence at the trial. I am however persuaded by Mr Lim's submission that Tan Sri Munir is in a position to give evidence at the trial regarding a "relevant fact" concerning the acquisition (which is relevant to the respondents' defence regarding the breach of duty issue (first suit) and/or conspiracy issue (counterclaims)). This is clear from the following reasons:

(a) Tan Sri Munir affirmed a statutory declaration pursuant to s. 169(15) of the Companies Act 1965 regarding the first plaintiff's audited accounts; and

(b) at the material time, Tan Sri Munir was the chairman and director of the first plaintiff.

[32] Based on the above reasons, encl. 210 is dismissed with costs.

Court's Decision

[33] In summary:

(a) encl. 178 is allowed with no order as to costs;

(b) encl. 180 is dismissed with no order as to costs;

(c) encls. 182, 184 and 210 are dismissed with costs of RM5,000 for each application;

(d) encls. 187 and 190 are dismissed with costs of RM1,500 for each application; and

(e) an allocatur fee is imposed on the above sums of costs

(decisions).

[34] I should end by stating the following:

(a) despite the decisions, the respondents retain the right not to call witnesses subpoenaed by them to testify at the trial (except for Tan Sri Azman Yahya (whose subpoena is set aside by the court));

(b) no finding on admissibility or non-admissibility of evidence is made in the decisions because the court did not embark on a trial based on affidavits, especially when there are conflicting averments in the affidavits; and

A (c) the integrity of the trial is preserved and the parties are at liberty to:

(i) examine-in-chief, cross-examine and re-examine witnesses; and

(ii) object to the admissibility of any evidence and to apply to court to exclude, expunge or disregard any evidence (except for statement of agreed facts which is filed pursuant to O. 34 r. 2(2)(j) RC and documents marked as part A and part B according to O. 34 r. 2(2)(d) and (e)(i) RC)

B

- as the parties see fit without being constrained in any manner by the decisions. In other words, the decisions do not invoke the application of issue estoppel principle to bar the parties at the trial.

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